

**FEDERAL COURT OF APPEAL**

BETWEEN:

**AIR PASSENGER RIGHTS**

**Appellant**

**-and-**

**ATTORNEY GENERAL OF CANADA**

**Respondent**

**-and-**

**CANADIAN TRANSPORTATION AGENCY**

**Intervener**

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**MOTION RECORD OF THE ATTORNEY GENERAL OF CANADA**

**Informal motion in writing for an extension of time  
to claim privilege over portions of two documents**

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**ATTORNEY GENERAL OF CANADA**

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**AFFIDAVIT OF VINCENT MILLETTE**

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I, **VINCENT MILLETTE**, of the City of Sainte-Marthe, in the Province of Québec,  
**AFFIRM AS FOLLOWS:**


1. I hold the position of A/Director, National Air Services Policy, with Transport Canada. As such, I have personal knowledge of the matters that I hereinafter depose. Where facts are not from my direct knowledge, I have stated the source of the information and that I believe it to be true.
2. I have been advised by Department of Justice counsel, and do believe, that the Applicant Air Passenger Rights seeks access to documents in the possession of the Canadian Transportation Agency (the "CTA").

3. I am advised by counsel for the Respondent Attorney General of Canada, that among the documents in the possession of the CTA are the following:
  - a. A single page March 18, 2020 email exchange, subject 'RE: From MinO: [REDACTED] [REDACTED] attached as Exhibit "A"; and,
  - b. A two-page March 22-23, 2020 email exchange between myself and Caitlin Hurcomb which occurred on, subject 'CTA announcement tomorrow', attached as Exhibit "B".
4. I am aware that Exhibits "A" and "B" were previously disclosed by Transport Canada to Parliament's Standing Committee on Transport, Infrastructure and Communities (TRAN Committee) in the context of a formal hearing on the impacts of COVID-19.
5. The documents were disclosed by Transport Canada in that forum with redactions to protect [REDACTED]  
[REDACTED]
6. Transport Canada is concerned that disclosure of these documents in an unredacted form may [REDACTED]  
[REDACTED] to determine whether any steps to protect the information contained in those documents may be necessary.
7. Transport Canada is also concerned that [REDACTED]  
[REDACTED] requests the opportunity to confirm whether that disclosure will raise any concerns
8. Further, the document Exhibit "A" contains [REDACTED]  
[REDACTED] Transport Canada requests an opportunity to [REDACTED]  
[REDACTED]
9. These documents were brought to Transport Canada's attention on or about December 9, 2021, by counsel for the Respondent AGC. I understand that they were provided to


Respondent counsel by counsel for the CTA. Upon receipt of the documents, Transport Canada undertook an immediate review and determined that consultation [REDACTED] [REDACTED] required.

- 10. Transport Canada was unable to complete those consultations prior to December 14, 2021.
- 11. Transport Canada is requesting an extension until January 30, 2021, or such other time as the Court of Appeal may see fit, to complete the consultations, and provide instructions to the Respondent's counsel for the two documents to either be disclosed without redaction, or else to be filed with this Court of Appeal with submissions arguing against disclosure.

Affirmed Before me )  
at the City of Ottawa in the Province )  
of Ontario before me on the 14<sup>th</sup> of )  
December, 2021 )

  
\_\_\_\_\_  
A Commissioner for Taking Affidavits )

LSO # 82792 P

  
\_\_\_\_\_

**Vincent Millette**

THIS IS EXHIBIT "A" REFERRED TO IN  
THE AFFIDAVIT OF VINCENT MILLETTE,  
Affirmed this 14<sup>th</sup> day of December, 2021

A handwritten signature in cursive script, appearing to read "Dupin", is written above a horizontal line.

A Commissioner, etc.

AL

**Salmasi, Aysa**

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**From:** Marcia Jones <Marcia.Jones@otc-cta.gc.ca>  
**Sent:** Wednesday, March 18, 2020 5:28 PM  
**To:** Stacey, Colin  
**Cc:** Caitlin Hurcomb; Allan Burnside; Davis, Mark; Millette, Vincent  
**Subject:** RE: From MinO: [REDACTED]

**Categories:** ATIP Retrieval Notice A-2020-00167BB, ATIP Retrieval Notice / A-2020-00091

Hi Colin,  
I am sending this unencrypted as our remote network access is patchy and we are not able to open encrypted emails on our Samsungs at the Agency.

I would note that for situations outside of the carrier's control, no refunds are required under the APPR. As you know, the Agency issued a determination on Friday to clarify some situations flowing from COVID-19 that are considered to be in that category.

[REDACTED]

If a flight cancellation is within the carrier's control, or within the carrier's control but required for safety, a refund is required [REDACTED]

Looping in Cait in case she has anything to add.

I hope this is helpful.  
Thanks,  
Marcia

**From:** Stacey, Colin <colin.stacey@tc.gc.ca>  
**Sent:** Wednesday, March 18, 2020 2:57 PM  
**To:** Marcia Jones <Marcia.Jones@otc-cta.gc.ca>  
**Cc:** Davis, Mark <mark.davis@tc.gc.ca>; Millette, Vincent <vincent.millette@tc.gc.ca>  
**Subject:** FW: From MinO: [REDACTED]

Hi Marcia,


[REDACTED]

Have you heard anything about this? Are you available to discuss?

Thanks,

cs

THIS IS EXHIBIT "B" REFERRED TO IN  
THE AFFIDAVIT OF VINCENT MILLETTE,  
Affirmed this 14<sup>th</sup> day of December, 2021

  
\_\_\_\_\_  
A Commissioner, etc.



AL

**Millette, Vincent**

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**From:** Millette, Vincent  
**Sent:** Monday, March 23, 2020 11:10 AM  
**To:** Stacey, Colin  
**Subject:** FW: CTA announcement tomorrow

**Categories:** ATIP Retrieval Notice A-2020-00167BB, ATIP Retrieval Notice / A-2020-00091

See response below from the Agency. It doesn't seem that the announcement would impact carriers that do not currently refund (AC) – perhaps just make them look bad.

**From:** Caitlin Hurcomb [mailto:Caitlin.Hurcomb@otc-cta.gc.ca]  
**Sent:** Monday, March 23, 2020 11:04 AM  
**To:** Millette, Vincent <vincent.millette@tc.gc.ca>  
**Subject:** RE: CTA announcement tomorrow

Hi Vincent,

This statement indicates what the CTA views as appropriate given this situation – an approach that would ensure passengers aren't totally out of pocket while taking into account concerns from airlines. The statement indicates that the CTA would consider vouchers acceptable "refunds" for those airlines that do require reimbursement in their tariff.

The statement does not force other airlines – whose tariffs do not require reimbursement in force majeure situations – to provide passengers with vouchers or credits. It indicates what we view as a good practice that would help make passengers whole [REDACTED]

If a complaint were brought forward to the CTA, it would be assessed on its own merits, of course.

Happy to discuss further,  
Cait

**From:** Millette, Vincent [mailto:vincent.millette@tc.gc.ca]  
**Sent:** Monday, March 23, 2020 10:20 AM  
**To:** Caitlin Hurcomb <Caitlin.Hurcomb@otc-cta.gc.ca>  
**Subject:** RE: CTA announcement tomorrow

Would your approach force in any way carriers that do not have refunds specified in their tariff to start refunding or their current tariff still apply?

**From:** Caitlin Hurcomb [mailto:Caitlin.Hurcomb@otc-cta.gc.ca]  
**Sent:** Monday, March 23, 2020 10:15 AM  
**To:** Millette, Vincent <vincent.millette@tc.gc.ca>  
**Subject:** RE: CTA announcement tomorrow

Hi Vincent,

I understand there is a plan to release a statement indicating that, generally speaking, for cancelled flights, an appropriate approach in the current context could be for airlines to provide affected passengers with vouchers

or credits for future travel. This was discussed between the Chair, the DM and the [REDACTED] and Marcia spoke with your ADM over the weekend as well.

It has been noted, though, that some airlines may not wish to provide vouchers, if their tariffs do not have any reimbursement requirement for force majeure situations.

Let me know if you'd like to discuss further.

Cait

**From:** Millette, Vincent [<mailto:vincent.millette@tc.gc.ca>]  
**Sent:** Monday, March 23, 2020 10:02 AM  
**To:** Caitlin Hurcomb <[Caitlin.Hurcomb@otc-cta.gc.ca](mailto:Caitlin.Hurcomb@otc-cta.gc.ca)>  
**Subject:** RE: CTA announcement tomorrow

Hi Cait – I am on a Min/DM call and I'm sure the question will come up. Any insight you can provide quickly?

Thanks

**From:** Millette, Vincent  
**Sent:** Sunday, March 22, 2020 2:22 PM  
**To:** 'Caitlin Hurcomb' <[Caitlin.Hurcomb@otc-cta.gc.ca](mailto:Caitlin.Hurcomb@otc-cta.gc.ca)>  
**Subject:** CTA announcement tomorrow

Hi Cait - I was just on a conference call with Lawrence, our ADM, where he briefed us on an announcement the Agency would do tomorrow regarding the refund and voucher issue.

[REDACTED]

We are not entirely sure we understand this. Can you explain?

Feel free to call me if easier 343-996-9858

Thanks!

Sent from my BlackBerry 10 smartphone on the Rogers network.

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**-and-**

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**WRITTEN SUBMISSIONS OF THE ATTORNEY GENERAL OF CANADA**

**Informal motion in writing for an extension of time  
to claim privilege over portions of two documents**

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**Overview**

1. An extension of time is being requested to determine whether two documents which are responsive to the Court of Appeal's October 15, 2021 Order should be the subject of privilege claims or should otherwise be protected from disclosure.
2. The Respondent has met the test and should receive the requested extension.

## Submissions

3. The background to the present motion is set out in detail in the October 15, 2021 Order and Reasons of the Honourable Justice Gleason, attached.
4. At paragraphs 29-30 of the Reasons, Justice Gleason states:

[29] I would accordingly order that, within 60 days from the date of the Order in these matters, all non-privileged documents sent to or by a member of the CTA (including its Chairperson or Vice-Chairperson) between March 9 and March 25, 2020 or sent to a third party by the CTA or received from a third party by the CTA between the same dates concerning the impugned statement or related to a meeting attended by a CTA member (including its Chairperson or Vice-Chairperson) between March 9 and March 25, 2020 where the impugned statement was discussed shall be provided electronically to the applicant. I would also order that, within the same period, the AGC shall provide the Court, on a confidential basis, copies of any document over which the CTA claims privilege, that would otherwise be subject to disclosure, along with submissions outlining the basis for the privilege claim. Such filing may be made via way of informal motion and should be supported by an affidavit attaching copies of the documents over which privilege is claimed. A redacted version of the AGC's submissions, from which all details regarding the contents of the documents are deleted, shall be served and filed. The applicant shall have 30 days from receipt to make responding submissions, if it wishes. These materials shall then be forwarded to the undersigned for a ruling on privilege.

[30] Should a 60-day period be too short to accomplish the foregoing, the AGC may apply for an extension, via way of informal motion supported by affidavit evidence, if the time provided is inadequate by reason of complexities flowing from the COVID-19 pandemic or the number of documents involved.

5. These submissions with the attached Affidavit of Vincent Millette<sup>1</sup> are being provided as submissions in an informal motion, to be heard in writing, in compliance with paragraphs 29 and 30, and in reliance on Rules 8 and 369 of the *Federal Court Rules*.
6. The Respondent, having otherwise complied with the requirements of paragraph 29, is requesting an extension of time to complete consultations and provide submissions in respect of two additional documents.
7. The basis for this request is set out in the attached affidavit of Vincent Millette. Summarily, Transport Canada has identified information in two documents otherwise subject to disclosure, which may raise concerns [REDACTED]  
[REDACTED] The extension is necessary to permit Transport Canada an opportunity to address those concerns and determine whether the documents may be disclosed or should be subject to an informal motion as contemplated by paragraph 29 of the October 15, 2021 Reasons.
8. Paragraph 30 of the Reasons is not an exhaustive description of possible basis for an extension, given that this Honourable Court has discretion, pursuant to Rule 8 of the *Rules*, to grant an extension of time to the Respondent if it is satisfied with the request.
9. The criteria applicable in considering an extension of time is well established before this Court. The party seeking the extension bears the burden of establishing (1) a continued intention to pursue the matter, more specifically in the present matter, to protect certain information from disclosure in the application; (2) that the application, or in this matter, the response thereto, has some merit; (3) that no prejudice arises from the delay; and (4) that there is a reasonable explanation for the delay.<sup>2</sup>
10. In the present motion for an extension of time, the Respondent submits that all the necessary criteria have been met.

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<sup>1</sup> Affidavit of Vincent Millette, Affirmed December 14, 2021, at para. 4.

<sup>2</sup> [\*Canada v. Hennelly\*](#), 1999 CanLii 8190 (FCA).

11. A continued intention to respond to the application is demonstrated as the CTA has served the majority of the documents compliant with paragraph 29 upon counsel for the Applicant. The Respondent has filed submissions in respect of two documents where privilege claims are being made, and served redacted submissions upon the Applicant.
12. The present motion in writing is also indicative of the continued intent.
13. The underlying Application is such that its merit can only be decided upon a hearing by this Honourable Court. The same can be said in respect of the response thereto. On its face, having regard for the record before the Court of Appeal's to date in this matter, there is no basis to conclude that the response has no merit.
14. No prejudice will result from the delay. The Application relates to a statement made by the CTA, in respect of the COVID-19 pandemic and airline vouchers. The Application has been ongoing since 2020 and the Applicant has not sought an expedited hearing, nor indicated that time is a factor in the outcome of the matter.
15. The delay is reasonably explained by the evidence contained in the affidavit of Vincent Millette, sworn December 14, 2021.<sup>3</sup> The Respondent requests an opportunity to consult  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED] These efforts were initiated but have not yet been completed.<sup>4</sup>

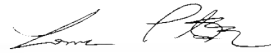
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<sup>3</sup> Millette Affidavit at paras. 9-11.

<sup>4</sup> Millette Affidavit, paras. 6-8.

16. As such, and having regard for the holiday recess period, the Respondent requests an extension to January 30 or such other date as this Court may see fit, to consult as needed and either disclose the remaining documents in issue, or prepare submissions supporting redaction and non-disclosure.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 14<sup>th</sup> DAY OF DECEMBER 2021



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**ATTORNEY GENERAL OF CANADA**

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for the Attorney General of Canada

## LIST OF AUTHORITIES

[Canada v. Hennelly](#), 1999 CanLii 8190 (FCA).